
tvp
the vinden partnership
The Best of
2016
WE TAKE A LOOK AT OUR MOST POPULAR ARTICLES FROM 2016...
WWW.VINDEN.CO.UK

VINDEN HAS CELEBRATED OVER 22 YEARS OF WORKING FOR CLIENTS IN THE CONSTRUCTION AND PROPERTY MARKETPLACE AND CONTINUES TO GO FROM STRENGTH TO STRENGTH.

THE VINDEN PARTNERSHIP

Working with an extensive range of clients within both the public and private sectors, The Vinden Partnership (Vinden) offers the construction industry a huge variety of services, delivered by an exceptionally talented and experienced team.

Here we present some of the highlights from articles The Vinden Partnership has produced in the last 12 months.

From its offices in Greater Manchester, Nottingham and central London the company undertakes education, residential, industrial, affordable housing, office, retail and health sector projects delivered to a wide range of clients and project stakeholders.

Vinden has celebrated over 22 years of working for clients in the construction and property marketplace and continues to go from strength to strength.

All clients are treated as "life time" clients and its priority, regardless of which of the many services are being provided, remains the same; that is to ensure the highest levels of client service and satisfaction are achieved at all times.

WWW.VINDEN.CO.UK

JOIN OUR MAILING LIST

a. Regent House, Folds Point, Folds Road, Bolton BL1 2RZ **t.** 01204 362888 **e.** tvp@vinden.co.uk

JOIN OUR MAILING LIST

ADJUDICATING TWO DISPUTES AT THE SAME TIME? – UNINTENDED CONSEQUENCES?

Paragraph 8(1) of The Scheme for Construction Contracts (England Wales) Regulations 1998 as amended by The Scheme for Construction Contracts (England Wales) Regulations 1998 (Amendment) (England) Regulations 2011 ("the Scheme") says;

"The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract". But what exactly does this mean?

And what if the cases overlap? An adjudicator is bound by the decision of a previous adjudicator.

For many years adjudicators have had to wrestle with jurisdictional challenges where a Responding Party alleged that more than one dispute had been referred for a decision in

contravention of paragraph 8(1).

If an adjudicator decided that more than one dispute had been referred to adjudication in the same adjudication then that was a problem. The practical answer, it was believed, was to encourage the Parties to reach an agreement for the Adjudicator to proceed to decide the two or more separate disputes at the same time, usually in exchange for an extended period for submission of the Response. If agreement could not be reached then the Referring Party was forced to issue separate notices of adjudication in respect of those separate disputes. It was believed that there was nothing wrong with this approach as a way forward. That is, until now.

The judgement handed down in Deluxe Art & Theme Ltd v Beck Interiors Limited [2016] EWHC 238 (TCC) now makes clear that paragraph 8(1) of the Scheme must be given a literal interpretation and an adjudicator cannot adjudicate two disputes at the same time, even if they are the subject of different notices and procedures, unless the Parties so agree.

This is an important decision and there are some unwelcome implications that arise from this judgement which Parties will need to keep in mind for future possible adjudications.

An Adjudicator Nominating Body ("ANB") will usually look to appoint the same adjudicator in multiple disputes between the same Parties on the same contract. They do so because it is understood that an adjudicator that has already dealt with one dispute should be able to deal with further disputes between the same Parties on the same contract in a more timely and cost-efficient manner than a new adjudicator would. I am not sure that approach will change. However, as a result of this judgement, ANBs will have to take care not to nominate the same adjudicator where he or she is yet to issue a decision in a previous adjudication. It is noticeable that the ANBs have already started to amend their procedures for nominating adjudicators.

Although serial adjudications in which the same adjudicator is appointed are not prohibited, the reality is that they will have to be conducted "end on end" rather than simultaneously. In practice a Responding Party in one adjudication could prevent the same adjudicator being appointed in a follow-up adjudication by starting the follow-up adjudication prior to a decision being issued in the preceding case.

And what if the cases overlap? An adjudicator is bound by the decision of a previous adjudicator. Will this mean that Parties will rush to obtain a decision in order to gain a tactical advantage in another adjudication that is ongoing?

All this does is increase uncertainty and I can't help but wonder if this is really what Parliament intended when drafting the Scheme. Perhaps an amendment is needed? We will have to wait and see if Parliament has an appetite for correcting the Scheme in order to address what appears to be an unintended consequence.

Peter Vinden is a practising Arbitrator, Adjudicator, Mediator and Expert. He is Managing Director of The Vinden Partnership and can be contacted by email at pvinden@vinden.co.uk. For similar articles please visit www.vinden.co.uk.

JOIN OUR MAILING LIST

WHEN NO DOESN'T ALWAYS MEAN NO

It is far from unusual for construction contracts to require instructions that are intended to vary the works by increasing or changing scope to be put in writing before an Employer is then obliged to pay for the work done under that instruction. The object of such a provision is clear; it is to avoid unwelcome shocks when it comes to settling the final account at a later date.

In reality we all know that variations are often instructed orally and if an adjudicator or arbitrator called upon to deal with such a claim is convinced that the Employer has received consideration for the instructed work, the contractor is likely to benefit from an award or decision requiring the Employer to pay for the instructed works.

Clever lawyers drafting contracts for their Clients will be tempted to head off the above scenario by including a "no amendment" or "anti-variation" provision in a drafted contract to make it clear that the Employer will have no liability to pay for any additional or varied work unless there is a written document signed by both Parties which varies the original contract to encompass the increased scope of works arising from the instructed amendment.

Call me old-fashioned and cynical if you like but could such an express term have been conceived with the intention of allowing an Employer potentially to get something for nothing? Or is such a term genuinely included to protect both Parties, such that the Contractor is not obliged to undertake any amended work and the Employer will not be obliged to pay any additional costs associated with the amendment unless it is in writing and signed by both Parties.

The Court of Appeal has recently considered "no amendment" clauses in a case called "Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd; CA 20 Apr 2016" in which the court had cause to consider a provision at Article 6.3 which said:

"This Agreement ....can only be amended by a written document which (i) specifically refers to the provision of this Agreement to be amended and (ii) is signed by both Parties"

Despite what appear to be clear words requiring any amendment to be in writing the Court of Appeal decided that it was still open to the Parties to vary their agreement orally or by conduct.

In what is a lengthy decision this is what the presiding judges had to say.

LORD JUSTICE BEATSON

"Absent statutory or common law restrictions, the general principle of the English law of contract ..... The parties have freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct. The consequence in this context is that in principle the fact that

the parties' contract contains a clause such as Article 6.3 does not prevent them from later making a new contract varying the contract by an oral agreement or by conduct."

LORD JUSTICE UNDERHILL

"It seems to me entirely legitimate that the parties to a formal written agreement should wish to insist that any subsequent variation should be agreed in writing (and perhaps also, as here, in some specific form), as a protection against the raising of subsequent ill-founded allegations that its terms have been varied by oral agreement or by conduct: even though ill-founded, such allegations may make the obligations under the contract more difficult to enforce, most obviously by making it more difficult to obtain summary judgment. But the arguments in favour of a flexible approach are also strong; and in the end, even if it were desirable to treat provisions of this kind as entrenched, I cannot see a doctrinally satisfactory way of achieving that result. I have considered whether there might be some kind of half-way house, which made it formally more difficult for a party to establish a "non-conforming" variation; but none was suggested in argument and I cannot see any that would be of realistic value.

It does not follow that clauses like the second sentence of Article 6.3 have no value at all. In many cases parties intending to rely on informal communications and/or a course of conduct to modify their obligations under a formally agreed contract will encounter difficulties in showing that both parties intended that what was said or done should alter their legal relations; and there may also be problems about authority. Those difficulties may be significantly greater if they have agreed to a provision requiring formal variation."

LORD JUSTICE MOORE-BICK

"I agree with Beatson LJ that Article 6.3 does not prevent the parties from varying the Agreement orally or in any other informal manner. The governing principle, in my view, is that of party autonomy. The principle of freedom of contract entitles parties to agree whatever terms they choose, subject to certain limits imposed by public policy of the kind to which Beatson LJ refers. The parties are therefore free to include terms regulating the manner in which the contract can be varied, but just as they can create obligations at will, so also can they discharge or vary them, at any rate where to do so would not affect the rights of third parties. If there is an analogy with the position of Parliament, it is in the principle that Parliament cannot bind its successors.

I can see the force of the suggestion that there might well be practical benefits in being able to restrict the manner or form in which an agreement can be varied, but like Underhill LJ I do not think that there is a principled basis on which that can be achieved. A clause such as Article 6.3 in this case may have considerable practical utility, if only because it is likely to raise in an acute form the question of whether parties who are said to have varied the contract otherwise than in the prescribed manner really intended to do so. As a matter of principle, however, I do not think that they can effectively tie their hands so as to remove from themselves the power to vary the contract informally, if only because they can agree to dispense with the restriction itself. Nor do I think this need be a matter of concern, given that nothing can be done without the agreement of both parties; and if the parties are in agreement, there is no reason why that agreement should not be effective."

SUMMARY

So although there is nothing to stop parties from including "no amendment" or "anti-variation" provisions in their contracts these provisions will not prevent Parties from subsequently amending or varying their contract by oral agreement and/or conduct.

Peter Vinden is a practising Arbitrator, Adjudicator, Mediator and Expert. He is Managing Director of The Vinden Partnership and can be contacted by email at pvinden@vinden.co.uk. For similar articles please visit www.vinden.co.uk.

THE EVALUATIVE MEDIATOR – ENTER STAGE LEFT

I am currently involved in a large mediation which I am struggling to settle. It isn't a complete train wreck. A gap of over £10 million has been reduced to less than £500K and the Parties are still talking to each other and otherwise exploring options to avoid spending the equivalent of the GDP of a small African country to litigate the dispute; so we will see.

In my private sessions with the Parties, both sets of lawyers over two long days said that they had started to lose confidence in the mediation process. I have heard this from other lawyers recently and it concerns me that Parties may be losing faith in a system of dispute resolution that I fervently believe in.

So why are Parties losing faith in mediation? Could it be because they enter the process with expectations that are simply unrealistic? Do Parties refuse to look objectively at their own case when negotiating? Do instructed experts lose sight of their roles and sometimes end up polluting the settlement well? Are the lawyers themselves to blame for encouraging their clients to set unrealistic objectives.

Are there hidden agendas that the mediator cannot identify? Yes, you've guessed it, I have encountered all these problems over the last 20 years (with many more besides) and sometimes with all of them arising in the same mediation! Happy days!

But what about the mediator's role? Do Parties select a Mediator who is merely going to facilitate the dispute, or do they select a mediator who has specialist knowledge of the industry and who might be willing to evaluate a Party's position in a private session, if

> *There is no doubt that if a Mediator begins to evaluate the dispute there is a possibility that he or she could risk losing the trust of one or more of the Parties.*

only to break a deadlock? Is this approach a legitimate technique for a mediator? What if one Party desires this approach but one or more of the others doesn't want to know?

There is no doubt that if a Mediator begins to evaluate the dispute there is a possibility that he or she could risk losing the trust of one or more of the Parties. Care must therefore be taken in how you approach the evaluation of a Party's position, if indeed you should adopt this approach at all.

OK, hands up! I admit that I am often inclined to tell a party that I think a position is going to be "difficult" (diplomatic speak for hopeless) to sustain, if I am convinced that they really need to hear what can be a difficult message to deliver. I justify this approach on the basis that a party is better to hear bad news within the confines and relative safety of a mediation as opposed to finding out after it is too late in an arbitration, adjudication or court case. Care needs to be taken in delivering such a message but I would argue that it cannot be right for a mediator to say nothing when he or she hears something that is plainly incorrect, particularly if a failure of the mediation is then likely to be the end result. It is not about the Mediator having an easy life, it is about trying to get the job done.

But I can only adopt this approach if the dispute falls within my specialist knowledge. So, in construction, civil engineering and professional negligence claims involving construction professionals, I consider it is legitimate to express a view in private if I hear a position being advanced which I know I would not entertain as adjudicator or arbitrator.

Clearly, in cases where I don't have specialist knowledge, for instance personal injury or medical negligence, it would be inappropriate for a construction professional to express a view on a party's case and so I stick to my knitting in such cases and adopt a facilitative approach. But this doesn't mean that I can't reality test a Party's position by asking probing questions and looking for the all-important breakthrough and concessions.

So how do Parties improve their chances of success in mediation? Clearly, approaching the mediation with an open mind, being willing to listen, negotiate and compromise are all important factors. BUT, above all else, make sure you pick a mediator who will be willing to go the extra mile to get the job done. Finally, ask yourself if you or your Client ought to select a mediator who will be willing and able to evaluate a position if he or she identifies that this approach is or may be needed in order to reach a settlement. Perhaps it is time for a different approach and Mediators who are willing to evaluate will stimulate renewed interest in the mediation game. Evaluative Mediators – enter stage left.

Peter Vinden is a practising Arbitrator, Adjudicator, Mediator and Expert. He is Managing Director of The Vinden Partnership and can be contacted by email at pvinden@vinden.co.uk. For similar articles please visit www.vinden.co.uk.

JOIN OUR MAILING LIST

KEEP IT SIMPLE STUPID - "KISS"

Construction is a complicated process, so misunderstood and underestimated by the glitzy programmes we see splashed all over our TV sets to keep us entertained on a cold winter's evening. If you have watched any of these programmes you will know that the projects invariably finish much later than expected by the unwitting clients and at a considerably higher cost than anticipated. Sadly, these TV exploits are closer to reality than we might wish.

It is rare these days to hear tales of projects that have been completed on programme and budget but they do exist and my colleagues in our PM team love to entertain me with stories of happy clients. Unfortunately, in my dispute team we are usually left dealing with projects that have gone wrong, more often than not because they have finished late and the Parties are left playing the "blame game".

There are many reasons why projects get into delay but often they will include a misunderstanding of the inter-relationship and interaction between sub-contractors, suppliers, designers and clients who insist on changing their minds part way through a project before they emit the immortal words "not me gov".

There is no excuse for failing to carefully plan and programme a proposed construction project and any contractor who fails to recognise this fact of life is in for serious trouble. Most, if not all, construction contracts contain provisions requiring the payment of liquidated damages in the event of late completion and, if they don't, then common law damages based on the costs incurred by the Employer will be payable. Add to this the additional costs incurred by a contractor who is late in finishing a project and it is not hard to see why it is so important to establish whether it is the Employer that has caused the delay and must stand the associated costs or it is the Contractor who has to take a financial hit. Without

an accurate construction programme, measuring and proving liability for delay is nigh on impossible.

It is against this background that the last twenty years has seen the rise in popularity of delay analysis and experts whose job it is to convince a tribunal that it is their opponent's client that has caused delay. The development of powerful computers and sophisticated delay analysis software has added to the price of establishing liability for delay and these guys and girls and the reports they generate do not come cheap. The stakes in the blame game are very high and Parties pay huge sums out to lawyers and experts just to get into the game!

In the adjudications I deal with it is quite the norm to be presented with several files of delay analysis by an expert to convince me that it is their client that has "clean hands" and that I should decide accordingly. Regrettably, the reports produced by delay experts are increasing in size and complexity and, at the risk of being cynical, it is not unusual to come across situations where a deliberate manipulation of the project software has been made in order to get the computer to say what the expert would like it to say rather than actually proving a Client's case – leaving me to wonder whether I am dealing with an expert or hired gun.

Delay analysts will tell you that there are different methods of analysing and proving delay liability, which include:

a Impacted as-planned
b As planned but for
c Collapsed as built
d Windows analysis
e Time impacted analysis
f As planned -v- as built

It is not for me to set out to persuade anyone which method of delay analysis is the best. The reality is that the choice of analysis will depend on when the analysis is being undertaken, what information is available, how good are the records and, frankly, what the client wants to spend! There are circumstances that would warrant all of these different approaches.

However, what I will say as someone who regularly sits as a tribunal is that the drafter of any delay analysis must keep in mind why the report is being prepared in the first place. I would also suggest that any report produced for the purpose of proving responsibility for delay follows the KISS principle by, in relation to each delaying event:

Explaining what was supposed to happen and when....

Explaining what actually happened in practice....

Explaining what the delay to the individual events are....

Explaining what the effect is on the project as a whole....

Construction can be broken down into key milestones and hence keeping delay analysis real is not rocket science. The analysis should be transparent. If changes have been made to the "what was supposed to happen" the analyst should declare them and avoid the fees involved in "hidden changes" being found and argued about at a later date. The progress should be evidenced contemporaneously. For example, a simple site diary entry that records plastering starting in an area can support a watertight date achieved. It is important that the analysis reflects real life and doesn't become a complex black art of float, criticality and mathematical calculations.

There is nothing like an "as planned v as built" analysis to provide a visual representation of the effects of delaying events on a project, but pictures alone will not be sufficient to satisfy a tribunal on the merits of a particular case. There remains no substitute for concise, clear and evidenced logical reasoning to discharge the burden of proving either an entitlement to an extension of time if you are advising a contractor or proving an entitlement to damages if you are acting for an Employer.

Peter Vinden is a practising Arbitrator, Adjudicator, Mediator and Expert. He is Managing Director of The Vinden Partnership and can be contacted by email at pvinden@vinden.co.uk. For similar articles please visit www.vinden.co.uk.

SETTLEMENT AGREEMENTS AND ADJUDICATION

Disputes are a fact of everyday life in the construction industry. Parties can manage to fall out over anything from the value of a particular variation to the quality of completed work or the value of an interim valuation, and so the list goes on and on. More often than not, these disputes are agreed as the work proceeds and these agreements may be recorded by a handshake, an exchange of emails or letters or even by the drawing up of a formal settlement agreement. All this is well and good until one party decides that it no longer wishes to be bound by the settlement agreement reached. So where does this leave you and, more importantly, can you rely on your statutory right to have the ensuing dispute decided by an adjudicator if the gloves have to come off?

The answer to this question is 'probably', but, as with all things in life, the answer is a little complicated and will depend on a number of factors. These factors include the circumstances under which the agreement is reached, the terms of the agreement itself and the express terms of the adjudication provision in the underlying contract.

Looking at these factors in more detail, ask yourself if the settlement agreement is intended to vary any of the terms of the underlying construction contract, is it intended to replace the underlying contract or is it simply a statement of what is actually provided by the terms of the underlying contract? For example, the parties may agree

> *To complicate things further, what if an allegation of misrepresentation is made in connection with the replacement contract which it alleges goes to the root of the agreement, could this be adjudicated?*

that the value of a particular variation is £100 and this could be simply a recognition of an entitlement that exists by virtue of express terms set down in the underlying contract, permitting the instruction of a variation, and other terms defining how the variation is to be valued. Clearly, the settlement agreement in this example does not set out to replace the underlying contract, it simply reflects an existing entitlement. If the agreement breaks down, then an adjudication can follow under the underlying construction contract.

But what if the agreement is a far more complex settlement agreement, covers a wide range of issues and clearly states that it is intended to cancel and replace the underlying construction contract? Such a settlement agreement may not be classed as a construction contract in its own right and thus no statutory right to adjudication then exists. The adjudication provisions set down in the original construction contract might come to your rescue, but then again it all depends on what the provisions actually say.

A contractual adjudication provision may restrict you to only adjudicating "disputes arising under the contract" or it may say "disputes arising under and in connection with the contract" or it may even say "disputes arising under, out of or in connection with the contract". A dispute that arises from a replacement contract, even if it is not classed as a construction contract, would still be caught by the second and third examples but arguably not the first.

To complicate things further, what if an allegation of misrepresentation is made in connection with the replacement contract which it alleges goes to the root of the agreement, could this be adjudicated? The answer would, in the first example, appear to be 'no', in the second 'possibly' and in the third example 'more than likely'.

Clearly, any doubt regarding the right to adjudicate under a settlement agreement can quickly be removed by including an express provision specifically catering for the adjudication of disputes but it is amazing how these things can get missed in the rush to document an agreement.

In preparing this article I have reviewed a number of judgements which include Shepherd Construction Ltd v Mecright Ltd [2000], Quarmby Construction Co Ltd v Larraby Land Ltd [2003], L Brown & Sons Ltd v Crosby Homes (North West) Ltd [2005] and J Murphy & Sons Ltd v W Maher and Sons Ltd [2016]. In doing so I have come to the conclusion that it is a difficult area of construction law which continues to develop. Whilst it does appear that the Courts are increasingly leaning towards allowing adjudication in settlement agreements and more cases are sure to follow, there can be no substitute for drafting carefully worded settlement agreements that clearly spell out that a right to adjudicate exists if that is what you intend.

Peter Vinden is a practising Arbitrator, Adjudicator, Mediator and Expert. He is Managing Director of The Vinden Partnership and can be contacted by email at pvinden@vinden.co.uk. For similar articles please visit www.vinden.co.uk.

JOIN OUR MAILING LIST

OPENING THE DOOR TO RECOVERY OF INTER-PARTY COSTS IN ADJUDICATION?

Some time ago I wrote two articles on the various ways in which a party could recover its costs in adjudication. The articles, which were published in May and June 2014, are still relevant today and are still available to read on our web site at Putting the EU Cat amongst the UK Pigeons and Adjudication and Back Door Cost Recovery.

Back then I speculated that it might become popular for Referring Parties to start claiming costs incurred in adjudication under The Late Payment of Commercial Debts (Interest) Act 1998 ("the Act") where the Parties' contract failed to include an adequate remedy to recover interest, and both interest and costs were being claimed by the Referring Party under the Act.

Sections 1(1) and 5A (3) of The Late Payment of Commercial Debts (Interest) Act 1998 entitle a creditor to claim interest (1(1)) and fixed compensation sums of £40, £70 or £100 depending on the size of the debt (5A (3)). The right to recover your additional reasonable debt recovery costs arises out of the amended section 2A which states:

"(2A) If the reasonable costs of the supplier in recovering the debt are not met by the fixed sum, the supplier shall also be entitled to a sum equivalent to the difference between the fixed sum and those costs."
For a time this prediction came to pass and myself and my fellow adjudicators were

> *Potential claimants have been waiting for a judgement to be handed down and for the door to be opened to all for the recovery of costs.*

regularly asked to decide that costs should be awarded as part of a Decision. This created consternation as, despite the apparently clear wording of the Act referred to above, many adjudicators, and I include myself in this, felt it was counter-intuitive to be able to award costs to a claiming party where no such remedy was available to a Responding Party. Could that be fair and how would the Court deal with such an application? We (adjudicators) needed some guidance from the Courts and we now have our first glimpse of how the Courts may deal with this issue through the handing down of a judgement in Lulu Construction Ltd v Mulalley & Co Ltd [2016] EWHC 1852 (TCC) ("Lulu").

In this case Lulu applied for summary judgement to enforce the balance of an adjudicator's decision in its favour for interest and costs incurred in an adjudication that had actually been referred by Mulalley in order to obtain a decision on the value of Lulu's final account.

Interestingly, Lulu didn't actually raise the claim for its costs until it issued its Rejoinder. Two issues arose in the proceedings. Firstly, did the lack of a reference to costs in the Notice of Adjudication mean that the Adjudicator lacked jurisdiction to deal with the cost recovery claim? Secondly, could the costs be awarded in any event?

In what is a relatively short judgement, Mr Acton-Davis QC decided that "debt recovery costs" were connected with and ancillary to the referred dispute and considered to be part of the dispute. Secondly, the failure to refer to costs in the Notice was not fatal to Lulu's claim, made for the first time in the Rejoinder, because it was Mulalley's Notice that had started the adjudication and not Lulu's.

Although we now have the start of some judicial guidance on the recovery of inter-party costs in adjudication courtesy of Lulu, it should be said that the decision isn't a binding statement of the law on the issue and we are still awaiting a final statement of the correct legal position from the Courts.

Potential claimants have been waiting for a judgement to be handed down and for the door to be opened to all for the recovery of costs. Lulu might just be the start of something and it will be interesting to see how many Parties will now try to bring claims which include an element for cost recovery where the underlying contract has failed to include an adequate remedy for dealing with the recovery of interest, and both interest and costs recovery are claimed under The Late Payment of Commercial Debts (Interest) Act 1998.

Peter Vinden is a practising Arbitrator, Adjudicator, Mediator and Expert. He is Managing Director of The Vinden Partnership and can be contacted by email at pvinden@vinden.co.uk. For similar articles please visit www.vinden.co.uk.

DIRECTORS – TROUBLE AHEAD? WHAT ARE YOUR OPTIONS?

They say that behind every successful business man or woman there will be at least one or more failures. I could at this point trot out a list of high profile names, known to us all, who have a list of failed companies behind them but that is not the subject of this paper, so let's move on.

Running a company involved in the construction sector is hard work. There is an infinite number of variables to juggle. Material price rises, labour shortages, highly strung staff, fickle banks, clients that insist on changing their minds but don't like paying, designers who haven't a clue what a proper construction detail looks like, unpredictable weather patterns, two-handed lawyers who don't know their right hand from their left, etc., etc. - the list just goes on and on. Even when you manage, usually by accident, to get "all your ducks in a row" the modest margin you expected to make can quickly disappear because of something that comes out of "left field".

Don't be naïve, problems hit the best of businesses in the nether regions. It is what you do about it and how quickly you react that determines whether or not the problem will prove to be fatal.

Let's assume for a minute that you are a director of a company involved in construction that has "issues". Who do you turn to for advice? What advice do you need? What are your options? Is a "Turn Around" possible or is failure inevitable? What are your responsibilities as a director? What does the future hold?

BUST OR NOT?

Not an easy question to answer, I know, but the first thing you have to decide is "How bad is it?" "Is the company insolvent?"

Section 123 of the Insolvency Act 1986 sets out a guide to establishing whether or not a limited company is insolvent.

A company is insolvent if:

- A company's liabilities exceed its assets – 'balance sheet test' and/or
- A company is unable to meet its debts as and when they fall due – 'cash flow test' and/or
- A company has not paid a debt exceeding £750 after being served with a written demand – 'statutory

demand' and/or
- A court judgement remains unsatisfied.

As soon as a company fails one or more of these tests, it is in English Law defined as being insolvent and the directors of the company concerned must recognise this position and are obliged to take appropriate action. In reality it is usually a company's inability to meet its debts as and when they fall due that defines whether or not it is insolvent.

WHY IS THIS SO IMPORTANT?

As soon as a company reaches a position where it fails one or more of the tests set out above, its directors are obliged to cease trading and take steps to safeguard the interests of all creditors. In practice this might mean implementing one of the procedures laid down in the Insolvency Act 1986 (Creditors Voluntary Arrangements, Administration, Liquidation etc.) but not always. Provided you act quickly enough, a formal insolvency may well be avoided.

But let's be clear, a director who refuses or wilfully neglects to protect the interest of a company's creditors may well find himself or herself personally liable for the debts of the company from the date when a reasonable director would have known or ought to have known that the company was insolvent. Burying your head in the sand should not be your first option!

SO WHAT ARE YOUR OPTIONS?

Even if your company is on the brink of or has become insolvent there will still remain the possibility of saving part or all of the business. Practical options open to you could include:
- Organising alternative funding lines
- Negotiating informal "time to pay" agreements with creditors - including HMRC
- Transferring contracts to other companies
- Accelerating cash collections
- Assigning debts to third parties
- A sale of the business
- Formal insolvency arrangements as part of a re-structure

One or a combination of these options should form the central plank(s) of the recovery plan.

The key to avoiding a formal insolvency and personal disaster is to recognise the issues and to act promptly and decisively after taking appropriate advice.

HOW DO YOU KNOW IF YOU HAVE THE RIGHT ADVISER ON BOARD?

Whether you navigate your way through troubled waters or not will depend on moving quickly and upon appointing an adviser who knows your industry and can advise you properly and practically.

If you have appointed the right adviser, that adviser will be concentrating on what can and will be done to ensure that you have a future. If it is all about what happened in the past, chances are you have picked the wrong adviser.
Let's be clear, there is no "one size fits all" solution. Every situation needs to be considered carefully, in confidence and a bespoke plan developed. Two final pieces of advice. Firstly, please be careful who you speak to. "Loose lips do sink ships". Secondly, be sure that your advisers have your interests at heart and are not simply thinking about the huge fees they can earn from a formal insolvency.

We are very proud to have clients that we re-structured over 20 years ago that went on to trade out of difficult circumstances and are now in a completely different position. Is this the kind of advice you are looking for?

Peter Vinden is Managing Director of The Vinden Partnership, the construction industry's leading turn-around specialist advisers. He can be contacted in total confidence by email at pvinden@vinden.co.uk. For similar articles please visit www.vinden.co.uk.

JOIN OUR MAILING LIST

EXPRESS TERMS AND THE SCOVILLE METHOD OF MEASUREMENT

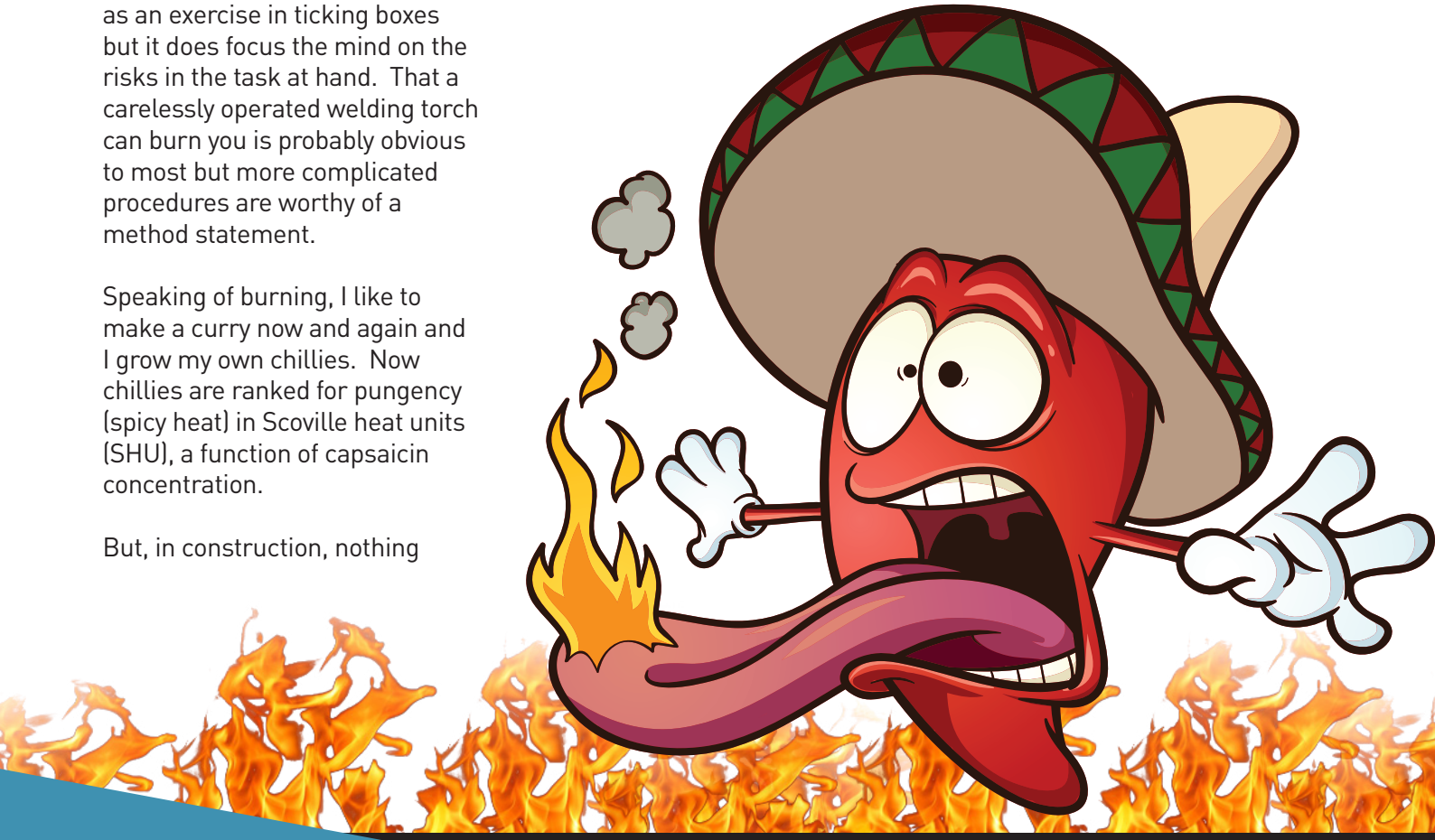
It's getting near that time of the year when everyone wants to round off with thoughts on what's gone right and wrong in our world and what might be done to change it for the better next year.

Health and safety regulations require risk assessments to be carried out for all activities, and rightly so. Gone are the days when you could put a ladder up against a wall, climb up and paint the gutters. The risk assessment might be dismissed, by some, as an exercise in ticking boxes but it does focus the mind on the risks in the task at hand. That a carelessly operated welding torch can burn you is probably obvious to most but more complicated procedures are worthy of a method statement.

Speaking of burning, I like to make a curry now and again and I grow my own chillies. Now chillies are ranked for pungency (spicy heat) in Scoville heat units (SHU), a function of capsaicin concentration.

But, in construction, nothing burns like an onerous contract. I spend quite a lot of my time reviewing proposed contracts for clients, trying to find the sneaky clauses inserted by the armies of lawyers employed nowadays to draft contracts for developers and employers, with a view to passing on all risks to the contractor. Or contractor to sub-contractor.

I try to find the most worrisome provisions and suggest alternative wording to arrive at a fairer solution. But for many contractors, and particularly the smaller sub-contractors, there is no such risk assessment involved and the contract is signed in order to get the work. The lawyer will say that's the sub-contractor's fault for not reading the document and the courts will uphold the principle that the two business entities were deemed fully capable of entering into an appropriate bargain.



But are they? In my experience, the average roofer knows a lot about roofing and the average bricklayer knows lots about bricks but neither of them will have a clue about contract law. In fact, how many reading this would know an effective pay-less notice if it knocked on their door?

The health of their employees depends on the success of these contracts yet, apart from the few who employ someone like me to review them, they are free to harm themselves, their sub-subcontractors and suppliers and the families of all of them.

I can't see any likelihood of a change to public policy involving new legislation to curtail the worst abuses in contract drafting but what about grading them on a standard scale? A standard JCT contract, for example, could attract a benchmark of (say) one chilli. As the onerous provisions mount up then so too would the contract march up the scale. Just like chillies.

Some of these contracts would be marked at such a scale that they would truly declare themselves to be capable of burning. No longer would a sub-contractor need to read the contract; when he needed any assistance, a high Scoville rating would send banks and suppliers running for the hills. The scale of the red chilli stamped on every page of the contract would serve as a strong disincentive to sign without further investigation. The fires started by these chillies would then be forced out.

So, if anyone has been sent a contract to sign recently and they want to know if they are looking at a sweet pepper or a bhut jolokia, send it over here and we'll check it out!

"But for many contractors, and particularly the smaller sub-contractors, there is no such risk assessment involved and the contract is signed in order to get the work."

Bob Lockhart is an experienced Quantity Surveyor and Non-Practising Barrister who specialises in preparing and defending contractual claims. He works as a Managing Consultant at The Vinden Partnership and can be contacted by email at blockhart@vinden.co.uk.
For similar articles please visit www.vinden.co.uk

the vinden partnership

A COMPLETE RANGE OF CONSTRUCTION PRODUCTS & SERVICES UNDER ONE ROOF

- QUANTITY SURVEYING & PROJECT MANAGEMENT
- BUILDING SURVEYING & PARTY WALL
- CORPORATE RECOVERY, RE-STRUCTURING & FUNDING SOLUTIONS
- CONSTRUCTION INSURANCE
- DISPUTE RESOLUTION
- SUSTAINABILITY (CODE ASSESSORS, SAPs / EPCs)




BOLTON: 01204 362 888

NOTTINGHAM: 0115 947 5334

LONDON: 0845 504 9733

RICS

WWW.VINDEN.CO.UK